



California Fair Political Practices Commission

May 22, 1987

Joseph D. Patello
Port Attorney
Port of San Diego
P.O. Box 488
San Diego, CA 92112

Re: Your Request for Advice
Our File No. A-87-123

Dear Mr. Patello:

We are responding to your request for formal written advice on behalf of Louis M. Wolfsheimer, a commissioner and board member of the San Diego Unified Port District (the "district"). The district operates Lindbergh Field Air Terminal (the "airport").

QUESTION

Is Mr. Wolfsheimer disqualified from participating in the board decisions regarding further restrictions on the hours during which jet takeoffs may occur?

CONCLUSION

Mr. Wolfsheimer is disqualified from participating in the pending decision regarding the hours during which takeoffs of certain categories of jet aircraft may occur at the airport. Under the Political Reform Act, he has a disqualifying financial interest in the decision. This is because it is reasonable to foresee that the decision will enhance the value of land owned by a client who has paid Mr. Wolfsheimer more than \$250 for legal representation in the past 12 months.

FACTS

The district is a public agency and tideland trustee organized and existing pursuant to the San Diego Unified Port District Act. The district is governed by a board of commissioners which has jurisdiction over certain San Diego Bay tide and submerged lands held in trust for the purposes of commerce, navigation, fisheries and recreation.

One of the functions of the district is operation of the airport, which is located on filled tidelands of San Diego Bay. The airport is the only commercial air carrier airport

serving the general public of the San Diego region. Domestic and international passenger and cargo service is provided by airlines using various models and makes of jet aircraft.

A regulation was adopted by the board in 1979 which prohibits aircraft takeoff between the hours of 11:30 p.m. and 6:30 a.m. In addition to this prohibition, the board is now considering a proposed regulation which would limit the type of aircraft permitted to takeoff from the airport between the hours of 10:00 p.m. and 11:30 p.m. on the basis of the level of noise generated. In other words, certain jet aircraft (known as Stage 3 under Federal Aviation Administration regulations) will be permitted to takeoff, while other more noisy aircraft (Stage 1 or Stage 2) will not be permitted to takeoff. The regulation is a noise abatement measure to provide relief from aircraft noise to members of the general public located in the area.

The extent of such noise abatement is difficult to define; however, it does appear there would be some degree of noise reduction. The district has aircraft noise monitoring equipment in place, both on and off the airport, which measures the extent of aircraft noise in the environs of the airport. Quarterly reports prepared by the district depict a noise contour of 65 CNEL (65 decibels of Community Noise Equivalency Level). The contours fluctuate depending on the number of landings and takeoffs, the type and weight of aircraft used, weather conditions and time of day of the aircraft operation. As provided in the noise standards, takeoffs and landings after 10:00 p.m. are penalized so that the noise after 10:00 p.m. is recorded by the monitoring equipment as if there were ten aircraft operations.

Mr. Wolfsheimer is a lawyer; he represents a client who owns a vacant parcel of real property in the City of San Diego. The client is a source of income to Mr. Wolfsheimer of more than \$250. An effort is being made to have the property rezoned for residential use and development. This requires a discretionary land use decision by the San Diego City Council.^{1/} In matters involving such discretionary actions,

^{1/} You have not indicated whether Mr. Wolfsheimer represents this client in the rezone matter. If he does, disqualification would be required pursuant to 2 California Administrative Code Section 18702(b)(3)(B) because there is a "nexus" between the purpose for which he receives income and the decision pending before the board. Our analysis, infra, assumes that no such nexus exists.

the city has a policy of not permitting residential development if the property is located within the 65 CNEL noise contour area. However, depending on the particular facts and any overriding considerations presented at a hearing, such development has been permitted in some cases.

The property subject to rezoning is located within two miles of the airport. The 65 CNEL contour curve crosses over an edge of the property. It is likely that the board will act on the proposed regulation before the city council holds its hearing on the rezoning. You have enclosed a map which indicates the location of the subject property and the 65 CNEL contour.

Mr. Wolfsheimer also has an interest in real property (a condominium) in excess of \$1,000 within the jurisdiction of the district (i.e., within two miles of the airport boundaries). The property is well within the area of the 65 CNEL. The proposed regulation would not remove this property from the 65 CNEL contour. The map which you enclosed also indicates the location of his property.

ANALYSIS

The Political Reform Act (the "Act")^{2/} requires that public officials disqualify themselves from making, participating in making, or using their official positions to influence any governmental decision in which they have a financial interest. An official has a financial interest in a decision whenever the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, on a member of the official's immediate family, or on:

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available

^{2/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(b) and (c).

Mr. Wolfsheimer is a public official, and the board's pending decision on the takeoff restrictions is a governmental decision. Consequently, Mr. Wolfsheimer must disqualify himself from participating in that decision if it will have a reasonably foreseeable material financial effect on his real property interest or on his client's real property interest.

The 65 CNEL contour is established on the basis of noise levels over time periods. Therefore, a shift in the timing of flights which resulted in no reduction in numbers of flights, nor any change in types of aircraft used, would not result in any change in the contour. However, because of the multiplier which is applied to noise from flights taking off after 10:00 p.m., the proposed reduction in noise levels of flights between 10:00 p.m. and 11:30 p.m. would be expected to alter the 65 CNEL contour.^{3/} It is reasonably foreseeable that the effect would be to reduce the current size of the area covered by the 65 CNEL contour. Virtually any reduction in the contour would move the contour away from Mr. Wolfsheimer's client's property. This would eliminate the need for seeking special approval from the city council to develop the property as

^{3/} If the same flights are shifted to earlier takeoff times, utilizing the same aircraft categories, there would be a reduction in noise equivalency of several-fold for each such flight. Only those flights utilizing Stage 2 would need to be shifted as a result of the proposed regulation. There are no Stage 1 flights at the airport because of another regulation.

The other option is for the airlines to substitute Stage 3 aircraft for Stage 2 aircraft for flights taking off after 10:00 p.m. Such a change would also reduce the 65 CNEL contour because Stage 3 aircraft are quieter than Stage 2 aircraft. After 10:00 p.m., this difference is also multiplied several-fold for purposes of the contour. We have discussed this in our telephone conversations, during which you graciously agreed to an extension of a few days for our response due to the complexity of this issue. Other external factors could also result in changes in flights one way or the other.

residential. (Apparently a rezone would still be required, but the special noise-level issues would not be involved.)

Where a decision will have a reasonably foreseeable effect upon a source of income which is not a business entity, the materiality standard in Regulation 18702(b)(3)(1) applies. That regulation states that a financial effect on such a source of income will be material if it is "significant." Given that the client is seeking to have the property rezoned for residential use and the property appears to be rather large, we conclude that a shift in the 65 CNEL contour away from the property would have a significant effect on the client.^{4/} As a result, disqualification will be required unless the effect on the client is substantially the same as the effect on a significant segment of the general public. (Section 87103; Regulation 18703.)

The Commission has concluded that the "public generally" exception does not apply to large parcels of undeveloped (or underdeveloped) property. (See Owen Opinion, 2 FPPC Ops. 77 (No. 76-005, June 2, 1976; Legan Opinion, 9 FPPC Ops. 1 (No. 85-001, August 20, 1985) copies enclosed.) Therefore, we conclude that disqualification is required based upon the effect upon the client. Consequently, we need not address the issue of whether Mr. Wolfsheimer's ownership of a condominium within the 65 CNEL contour area would independently require his disqualification.^{5/}

^{4/} Our conclusion would likely be the same even if the client were a business entity (unless the client was a very large business entity) given the size of the property, the land use being sought, and the effect upon that land use of the 65 CNEL contour.

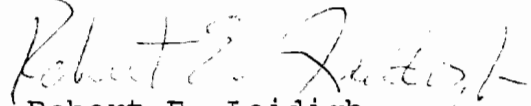
^{5/} This would be the case if the reduction in noise level between 10:00 p.m. and 11:30 p.m., or an overall reduction in noise level due to reduced flights or use of different aircraft, resulting from the adoption of the regulation, would have an effect of \$1,000 or more on the fair market value of his condominium. However, this effect would have to be distinguishable from the effect upon a significant segment of the general public. (See Holland Advice Letter, No. A-86-092, copy enclosed, for a discussion of the issues involved.)

Joseph D. Patello
May 22, 1987
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I trust this letter responds to your question. If you have questions regarding this letter, I may be reached at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel


By: Robert E. Leidigh
Counsel, Legal Division

DMG:REL:plh
Enclosure



Port of San Diego

and Lindbergh Field Air Terminal

(619) 291-3900 • P.O. Box 488, San Diego, California 92112

APR 20 9 40 AM '87

16 April 1986

Fair Political Practices Commission
State of California
Post Office Box 807
Sacramento, California 95804

Attention: Legal Division

Gentlemen:

This is a request for formal written advice concerning the operation of the San Diego Unified Port District (Port District), a public agency and tideland trustee organized and existing pursuant to the San Diego Unified Port District Act, which has been codified in the California Harbors and Navigation Code, Appendix 1.

The Port District is governed by a Board of Port Commissioners (Board) and has jurisdiction over certain San Diego Bay tide and submerged lands which are held in trust for the benefit of the people of the State of California for the purposes of commerce, navigation, fisheries and recreation. One of the functions of the Port District is the operation of Lindbergh Field, San Diego International Airport (Airport), which is located on filled tidelands of San Diego Bay. Lindbergh Field is the only commercial air carrier airport serving the general public of the San Diego region, and domestic and international passenger and cargo service is provided by airlines using various models and makes of jet aircraft.

As owner and operator of the Airport, a regulation was adopted by the Board in 1979 which prohibits any aircraft to takeoff between the hours of 11:30 p.m. and 6:30 a.m., local time. In addition to this prohibition, the Board is now going to consider a regulation which would limit the type of aircraft which will be permitted to takeoff from the Airport between the hours of 10:00 p.m. and 11:30 p.m., local time, on the basis of the level of noise generated by such aircraft. In other words, certain jet aircraft (known as Stage 3 under Federal Aviation Administration [FAA] regulations) will be permitted to takeoff while other more noisy aircraft (Stage 1 or Stage 2) will not be so permitted. The regulation is a noise abatement measure and will provide some relief from aircraft noise to all members of the

general public located in the environs of the Airport. The extent of such noise abatement is difficult to define, however, it does appear there would be some degree of noise reduction. The Port District has aircraft noise monitoring equipment in place, both on and off the Airport, and does measure the extent of aircraft noise in the environs of the Airport in accordance with the standards and methodology established by the California Noise Standards, adopted by the Department of Transportation of the State of California. Quarterly reports are prepared by the District which depict a noise contour of 65 CNEL in accordance with those standards. The contours fluctuate depending on the number of landings and takeoffs, the type and weight of aircraft used, weather conditions and time of day of the aircraft operation. As provided in the Noise Standards, takeoffs and landings after 10:00 p.m. are penalized so that the aircraft noise of each aircraft operation after 10:00 p.m. is recorded by the noise monitoring equipment as if there were ten aircraft operations.

With this background in mind, a member of the Board of Port Commissioners, who is a lawyer, represents a client who owns a vacant parcel of real property in the City of San Diego. The client is a source of income in excess of \$250.00. An effort is being made to have the property rezoned for residential use and development and requires a discretionary land use decision by the City Council of the said City. In matters involving such discretionary actions, the City has a policy of not permitting residential development if the property is located in a noise contour area within the 65 CNEL, however, depending on the particular facts and overriding considerations presented at a hearing, such development has been permitted. The last quarterly report prepared by the District indicated the 65 CNEL curve crossed over an edge of the property. The property is located within two miles of the Airport. Please see enclosed map which indicates the subject property shown in yellow.

The same Commissioner also has an interest in real property (a condominium) in excess of \$1,000.00 within the jurisdiction of the District, i.e., within two miles of the airport boundaries. The property is within the area of the 65 CNEL. The proposed regulation would not remove the property from the 65 CNEL contour. Please see enclosed map which indicates the subject property shown in pink.

Fair Political
Practices Commission

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16 April 1987

Based upon the above interests and facts, Commissioner Louis M. Wolfsheimer, the Board member involved, has asked that I request formal written advice as to whether he may participate and vote on the proposed Airport regulation. It is likely that the Board will act on the proposed regulation before the City Council holds its hearing on the rezoning.

In the event additional facts or other information is needed in order to properly resolve this matter, please let me know.

Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Patello", written in a cursive style.

JOSEPH D. PATELLO
Port Attorney

JDP:sw

enclosure

Campaign

Letter to Michael C. Flynn, Friends of Sally Ann Miller,
Irvine, Dated April 6, 1987, File No. A-87-076

The Political Reform Act does not contain limitations on campaign contributions or expenditures and does not prohibit a candidate or committee from holding auctions. Campaign funds may be deposited into interest bearing accounts, U. S. Treasury notes, or any other type of investment.

Letter to Raymond Gaskill, American Savings and Loan, Irvine,
Dated April 10, 1987, File No. A-87-082

A commercial lending institution which makes a loan to a committee which is secured by a certificate of deposit is not required to disclose the loan on its major donor report.

ADVICE SUMMARIES - LOBBYING

Letter to Janie Hawker, Sierra Club, Sacramento, Dated
March 18, 1987, File No. A-87-054

Advice on reporting compensation to nonlobbyist employees of the Sierra Club legislative office, including the editor of a legislative newsletter.



California Fair Political Practices Commission

April 21, 1987

Joseph Patello
Port Attorney
Port of San Diego
P.O. Box 488
San Diego, CA 92112

Re: 87-123

Dear Mr. Patello:

Your letter requesting advice under the Political Reform Act was received on April 20, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John G. McLean, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Adm. Code Sec. 18329).) You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

[Handwritten signature]
Diane M. Griffiths
General Counsel

DMG:plh